

(1991) 03 BOM CK 0017
In the Bombay High Court
Case No : L.P.A. NO. 34 of 1991

Saumyendra Nath Mookerjea

APPELLANT

Vs

Anz Grindlays Bank, Bombay

RESPONDENT

Date of Decision : 26-03-1991

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1991) 93 BOMLR 502 : (1992) 65 FLR 896 : (1992) 2 LLJ 512

Hon'ble Judges : P.S. Patankar, J;M.L. Pendse, J

Bench : Division Bench

Judgement

Pendse, J.—The appellant was serving as an Officer in the United Commercial Bank Limited for about 6 years between 1963 and 1969 and held various senior positions, including Branch Manager of various Branches. The respondent is a foreign Bank, having its registered Office at London and various Branches in India. The respondent Bank is wholly owned subsidiary of Australia and New Zealand Banking Group Limited. The appellant, in response to the advertisement issued by the respondent Bank, applied for the post of Statistician in the year 1969 and was recruited for Management Information System Division. The post of Bank's Statistician was a newly created one and was classified as a "Special Staff" category job. The appellant joined the service with effect from June 2, 1969. The appellant held various senior positions in the Bank at various levels and claims to have worked to the satisfaction of his superiors. From April 1986, the appellant was awarded Salary Administration Grade "F" with all terms and conditions applicable to such grade which is of a Chief Manager. In January 1989, the appellant was summoned to Bombay to work on a Special Project.

2. It is the claim of the appellant that on August 6, 1990 he was called to the Chamber of Mr. Cooke who was working as General Manager, Personal Banking in Bombay and was advised in the presence of Mr. Javeri, General Manager, Management Services and Mr. Mavinkurve to voluntarily retire from service. The appellant was told that in case the appellant declines to do so, then his services

would be terminated forthwith. The appellant sought time to consider the advice as the appellant had still about 8 years" service left. The appellant received letter dated August 6, 1990 of the Bank on August 11, 1990 terminating the service of the appellant on the ground that the services are no longer required. The termination was effected in accordance with the provisions contained in Section XXV para (2) of the terms of service applicable. The relevant provisions read as follows :

"The Bank may terminate the services of an officer by giving him/her 3 months" notice in writing or on payment of salary in lieu of notice."

The appellant instituted Small Cause Suit No. 6326 of 1990 on August 31, 1990 in the Bombay City Civil Court at Bombay claiming that the purported termination of the services by letter dated August 6, 1990 is illegal, null and void and not binding on the appellant. The appellant claimed that the termination order was at the instance and instigation of certain officers who are out to see that the career of the appellant is finished. The appellant claimed that certain officers of the Bank are jealous of the appellant's success and the termination is resorted to take vengeance against the appellant. The appellant, therefore, sought a declaration to the following effect :

"That this Hon"ble Court to pleased to declare that the purported terminations of the Plaintiff's services with the Defendants by their letter dated August 6, 1990 is null and void, illegal, mala fide, unenforceable in law and not binding on the Plaintiff and that the Plaintiff continues to be in employment of the Defendants."

The appellant only sought the declaration without any consequential reliefs but sought interim relief pending the suit. The appellant desired that the Bank should not obstruct the appellant from attending the duties and should not withdraw the perquisites and facilities enjoyed including residential flat, availability of chauffeur driver car and telephone facilities.

3. The appellant took out Notice of Motion No. 4509 of 1990 seeking injunction restraining the Bank from withdrawing the facilities and the perquisites available to the post which the appellant was holding. The appellant obtained ad interim relief in the motion and when the motion came up for hearing, the Bank file affidavits asserting that the suit was not maintainable and City Civil Court had no pecuniary jurisdiction to entertain and try the suit. The Bank claimed that even assuming that the termination of the services of the appellant is contrary to law, still it is not open for the Court to grant the declaration sought by the appellant. Thee Bank contended that the only remedy of the appellant, if any, for alleged wrongful dismissal is to seek damages and the declaration that the appellant continues to be in employment of the Bank cannot be decreed. The trial Judge framed the preliminary issue about the maintainability of the suit and came to the conclusion that the suit was not maintainable as it is not permissible to grant such such declaration unless the plaintiff in entitled to protection under Article 311 of the Constitution or under the provisions of the Industrial Disputes Act or

the employee is in the employment of the Statutory Corporation. In view of the finding that the suit was not maintainable, the finding on the issue as to whether the City Civil Court had pecuniary jurisdiction to try the suit was not answered. The Trial Judge by order dated December 18, 1990 dismissed the suit as not maintainable and vacated the ad interim order secured by the appellant on institution of the suit.

The appellant preferred First Appeal No. 180 of 1991 in this Court but the appeal was summarily dismissed by the learned Single Judge by speaking order dated March 4, 1991. The learned Single Judge agreed with the finding of the trial Judge that the suit for specific performance of the contract of personal service is not maintainable. The learned Single Judge did not accept the contention of the appellant that Mr. Justice Bhagwati as he then was in the decision reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , has carved out one more category of employment where it is permissible for the Court to grant specific performance of contract of personal service. The appellant has preferred appeal under the Letters Patent to challenge the decision of the Single Judge.

4. Shri Rane, learned counsel appearing on behalf of the appellant, submitted that the conclusion reached by the trial Judge and the learned Single Judge is not correct and it is open for the Court to grant declaration as sought by the appellant. The learned counsel urged that this is not the case where the termination of employment is invalid but the termination is on est or void ab initio and consequently, the appellant continues to be in the employment. The learned counsel submitted that Mr. Justice Bhagwati, as he then was, in the decision in Executive Committee of Vaish Degree College case (supra) observed that even if a statutory body or public authority terminates the service of an employee in breach of a contractual obligation, then the employee could regard the termination as ineffective and claim a declaration that his service is continuing. Shri Rane contended that the decision of Mr. Justice Bhagwati is binding on this Court and consequently, the suit cannot be thrown out on the ground of maintainability. Shri Sawant, learned counsel appearing on behalf of the Bank, on the other hand, submitted that whatever may be the phraseology of the relief sought or the averments in the plaint, the appellant really desires the order of the termination should be set aside and the appellant should be reinstated in service and such a relief cannot be granted in view of long time of decisions of the Supreme Court. Shri Sawant controverted the claim of the appellant that the termination was non est because the order of termination could be issued only by the Bank and not by Mr. Javeri who was holding Grade "G" and was, therefore, not entitled to terminate the service under Rule XXV (2) of the terms of services.

5. In view of the rival submissions, the principal question which arises for determination in this appeal is whether the suit filed by the appellant for declaration that the order of termination has no existence in law and that

appellant continues in the employment of the Bank is maintainable. Before examining this issue, it is necessary to mention that Shri Rane contended that the termination permissible under Rule XXV (2) of the terms of service is only at the behest of the Bank and not by an officer. Shri Rane also contended that Rule XXV (2) is void as it is not permissible to terminate the service by merely giving three months' notice or payment of salary in lieu of notice. Shri Rane referred to the decision of the Supreme Court reported in *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and another*, in support of this submission. It is not necessary to examine the contention of the learned counsel as we will proceed to ascertain whether the relief sought in the suit is permissible on the assumption that the termination was improper. The crucial question is whether an employee is entitled to such a declaration. Shri Sawant very rightly contended that it is not permissible for the Civil Court to grant a declaration as sought by the appellant in view of long line of decisions of the Supreme Court. The learned counsel relied upon the decision reported in *Executive Committee of Vaish Degree College, Shamli and others v. Lakshmi Narain and others* (supra). In the case before the Supreme Court the Executive Committee of Vaish Degree College was registered under the Co-operative Societies Act as an institution for imparting education and affairs of the College were managed by the Executive Committee and the College was affiliated to Agra University and as a consequence thereof had agreed to be governed by the provisions of the Agra University Act or the statutes made thereunder. The management appointed Lakshmi Narain as Principal on permanent basis with effect from July 1, 1964 and the appointment was approved by the Vice Chancellor of the University. Two years thereafter differences arose between the Committee and Lakshmi Narain and ultimately the Committee informed Lakshmi Narain not to discharge the duties of the Principal. The Committee thereafter passed resolution terminating the services of Lakshmi Narain. Lakshmi Narain instituted suit for restraining the Committee by an injunction from interfering with his duties as Principal of the College. The trial Court dismissed the suit, while the District Court in appeal decreed the claim. The matter was further carried before the High Court of Allahabad and then issue as to whether the Civil Court can grant the relief of injunction was referred to the decision of the Full Bench. The Full Bench answered the issue in favour of Lakshmi Narain and consequently the Single Judge dismissed the appeal. The matter was carried to the Supreme Court by Special Leave and the question which arose for consideration was that whether the Civil Court can enforce a contract of personal service in absence of special circumstances as laid down by the several decisions of the Supreme Court. The Supreme Court referred to the earlier decisions reported in *S.R. Tewari Vs. District Board Agra and Another*, where it was held that under the Company Law, the Court will not ordinarily force an employer to retain the services of the employee whom he no longer wishes to employ. This rule is subject to certain well-recognised exceptions. To the same effect are the decisions of the Supreme Court reported in *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, . Indian Airlines*

Corporation Vs. Sukhdeo Rai, , Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis, and Sirsi Municipality v. Cecelia Kom Francis Tellist. The Supreme Court approved the earlier decisions and held 1976 I LLJ 63 .

"On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. The rule, however, is subject to three well recognized exceptions - (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute."

Shri Sawant submits that the view has been reiterated by the Supreme Court in the subsequent decisions reported in Dipak Kumar Biswas Vs. Director of Public Instruction and Others, and Jitendra Nath Biswas Vs. M/s. Empire of India and Ceylon Tea Co. and Another, .

6. Shri Rane did not dispute that the Supreme Court has consistently taken the view that a contract of personnel service cannot ordinarily be specifically enforced and the Court would not give declaration that the contract subsist and the employee even after having been removed from service can be deemed to be in service. Shri Rane urged that though the three well recognized exceptions are set out repeatedly in the decisions of the Supreme Court, there is a fourth category available as found by Mr. Justice Bhagwati in the concurring judgment delivered in Vaish Degree College case (supra). Shri Rane invited our attention to the concurring judgment of Mr. Justice Bhagwati where the learned Judge observed that the trend of the decisions of the Supreme Court clearly indicates that it is not open for an employee faced with a wrongful termination to refuse to accept the repudiation and can claim continuance of contractual obligation. The learned judge observed that it seems to be generally recognized that wrongful repudiation of the contract of employment by the employer effectively terminates the employment and only entitles the employee to claim damages. The judgment further sets out that the contract of the employment is not specifically enforced because ordinarily it is a contract of personal service and quoted the locus classics of Lord Justice Fry in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, .

"For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of making that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery, and therefore, speaking for myself, I should lean against the

extension of the doctrine of specific performance and injunction in such a manner."

The learned Judge then observed that it is not possible to doggedly hold fast to these doctrines which correspond to the social realities of an earlier generation, far removed from ours. It was observed that it is necessary to rid the law of these anachronistic doctrines and bring it in accord "with the felt necessities of the times". The learned Judge observed that to deny reinstatement of the employee by refusing specific performance in such a case would amount to throwing out the employee to the mercy of the employer. The Learned Judge then observed (p. 181) :

"It is, therefore, necessary and I venture to suggest, quite possible, within the limits of the doctrine that a contract of personal service cannot be specifically enforced, to take the view that in case of employment under a statutory body or public authority, where there is a ordinarily no element of personal relationship, the employee may refuse to accept the repudiation of the contract of employment by the statutory body or public authority and seek reinstatement on the basis that the repudiation is ineffective and the contract is continuing.

The Learned Judge then stated that this would be somewhat novel and orthodox ground which has not been recognised by any decision of the Supreme Court so far. The Learned Judge made it clear that he did not propose to finally pronounce upon it and it may be possible view and some day the Supreme Court may have to consider it.

7. Relying on these observations in the judgment of Mr. Justice Bhagwati, it was urged on behalf of the appellant that the observations of the learned judge are binding upon this Court and in addition to the three well-recognised exceptions, the fourth exception is crabbed out by the Supreme Court. It was urged that under the fourth exception carved out, specific performance of contract of personal service can be granted in all cases of employment in large organisation. Shri Rane could not clearly define what according to him is large organisation, nor could explain as to which category of employees would be then left out. It is not possible to accede to the submission of the learned counsel that the Supreme Court had given a binding decision creating a fourth category where the relief of specific performance of reinstatement can be granted.

8. The contention of the appellant that the decision of Mr. Justice Bhagwati carves out a new exception with a view to adopt the law to the modern conditions cannot be accepted for more than one reason. In the first instance, the decision of Mr. Justice Bhagwati was considered by the Supreme Court in *Arya Vidya Sabha, Kashi and Another Vs. Krishna Kumar Srivastava and Another*, . In this case, Mr. Justice Krishna Iyer speaking for the Bench, observed that, may be, there is much to be said in favour of the view set out by Mr. Justice Bhagwati, but the Bench was bound by the decision of the Supreme Court as expounded by the majority view of Mr. Justice Khanna and Mr. Justice Murtaza

Fazl Ali. In other words, the Supreme Court in a later decision has declined to accept the observations made by Mr. Justice Bhagwati in the concurring judgment. The second reason for not acceding to the summation of Mr. Rane is that Mr. Justice Bhagwati very clearly observed on two occasions in the judgment that the law was not declared and the learned Judge was not finally pronouncing the ratio about the observations made in the judgment. It was also observed that it may be a possible view and some day the Court may consider it. These two observations in the decision of Mr. Justice Bhagwati clearly establish that the learned Judge was not laying down a binding law carving out the fourth category of exception and where specific performance of a contract of personal service can be granted. Thirdly, we are unable to ascertain in which cases the fourth category of exception as claimed by Mr. Rane can be made applicable. It is tried to be suggested that all cases which do not fall in the well-recognised three exceptions should fall in the fourth category. Acceding to this submissions would lead to very unusual results. There would be separate of claims for enforcement of contracts of personal service and the employer would be forced to continue those whom he does not desire to employ. It also cannot be overlooked that Shri Rane could not cite a single decision of the Supreme Court or of any Court where the thought propounded by Mr. Justice Bhagwati has been accepted. In these circumstances, it is not possible to accept the contention that the suit instituted by the appellant for the declaration is maintainable in view of the observations of Mr. Justice Bhagwati.

9. Shri Rane relied upon the decision of Court of Appeal reported in All England Law Reports 191 (3, page 1345, Hill v. C. A. Parsons and Co. Ltd. In that case, the plaintiff was a chartered engineer aged 63 and was due to retire at the age of 65. The plaintiff and the other professional engineers were not members of any trade union but the other employees of lesser standing belonged to one of two rival unions. One of the unions began a vigorous campaign to increase its membership and acquire exclusive negotiating rights with the defendants-employers. The employer gave way to the pressure of the union and signed an agreement under which all the ampoules including professional engineers were required to join the union within 12 months from signing of the agreement. The employer called upon the plaintiff to join the Union and the plaintiff refused. The employer thereupon terminated the contract of employment with one month's notice. The plaintiff approached the Court and sought injunction restraining the employer from terminating the contract of employment. The trail Judge declined to grant injunction by relying upon the decision of the Privy Council in the case reported in 1962 (3) AER 633, where Lord Morris observed :

"In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principal of law that the Courts will not grant specific performance of contracts of service."

The plaintiff went in appeal and the appeal was allowed by Lord Denying and Mr.

Justice Sachs holdings that ordinarily if a master insisted on the servant's termination of employment, then in spite of the fact that notice was unlawful, the relationship of master and servant comes to an end, for it was inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties. It was then observed that the rule was not, however, inflexible and where special circumstances existed, the Court had power to grant a declaration that the relationship still subsisted and injunction to stop the master treating it as at an end can be granted. Noticing the peculiar facts of the case, it was observed that the employer had no grievance against the plaintiff and was forced to terminate the service because of the pressure tactics of the Union and that too, when the plaintiff had hardly two years of service left, Lord Denning also observed that the length of notice for termination of employment was not sufficient with reference to the impending operation of the Industrial Relations Act, 1971. Mr. Justice Stamp delivered a differing judgment pointing out that there were no exceptional circumstances and reference to Industrial Relations Act, 1971 was not accurate.

Shri Rane submitted that Lord Denning has recognised exceptional cases in which injunction can be granted and the same rule should be made applicable while granting specific performance of contract of personal service. It is not possible to conclude in the face of catena of decisions of the Supreme Court that specific performance of the declaration as sought by the appellant can be granted.

10. Shri Rane finally submitted that the Supreme Court while noticing three well recognized exceptions to the general rule that the Court would normally not give declaration that the contract subsists and the employee can be deemed to be in service against the will of the employer, observed that there can be exceptional cases. The learned counsel placed strong reliance upon the observation that a contract of personal service cannot "ordinarily be specifically enforced", and urged that even the Supreme Court contemplated some exceptional cases. It was suggested that the present case is an exceptional case where the relief can be granted. A reference was made to two decisions of the Supreme Court *Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora*, . It is not possible to accede to the submission of the learned counsel. The consistent view of the Supreme Court does not permit us to make a departure in the present case on the specific ground that this is an exceptional case. We do not find anything exceptional about the present case and the exceptional fact. We are unable to accept the contention that in two decisions referred to by the learned counsel specific performance of contract of personal service was granted. In our judgment, the view taken by the trial Court and upheld by the Single Judge does not suffer from any infirmity and the appeal must fail.

11. Accordingly, appeal is dismissed with costs.

12. Shri Rane orally applies for leave to appeal to the Supreme Court. Application refused.

13. Appeal From Order No. 29 of 1991 arises out of dismissal of Notice of Motion taken out by the appellant for grant of interim relief. The First Appeal preferred against the conclusion of the trial Court that the suit is not maintainable stands dismissed and so also the Letters Patent Appeal by our judgment delivered today. Both the counsel request that the Appeal From Order be also placed before the Division Bench and disposed of because the relief in the Appeal From Order will not survive in view of the decision in the Letters Patent Appeal No. 34 of 1991.

Accordingly Appeal From Order taken on board and called out for hearing and is dismissed with costs.

14. Shri Abhyankar applies for continuation of interim relief for a period of two months to enable the appellant to approach the Supreme Court. Shri. Sawant opposes the application by pointing out that apart from the furnished residence in occupation of the appellant, the appellant is also holding a chauffeur driven Standard 2000 car and telephone facility. The appellant is also provided with services of three servants. Shri Sawant submits that the appellate should return the chauffeur driven car forthwith and then the Bank has no objection if furnished accommodation is continued with the appellant till end of May 1991. The Bank has also no objection to the appellant using telephone facility on condition that appellant would pay all the telephone charges. The Bank would also permit the appellant to enjoy the services of one of the employees out of three at present available; till the end of May 1991.

Accordingly, the appellant is permitted to remain in occupation of the furnished accommodation and enjoy services of one servant and enjoy the telephone facility till end of May 1991, but on condition that the chauffeur driven car is returned to the Bank forthwith.